STATE OF MICHIGAN
IN THE SUPREME COURT

In the matter of:
Estate of Robert D. Mardigian,
Deceased
(a.k.a. Robert Douglas Mardigian,
deceased)

Case No. _____
Court of Appeals Case No. 319023

Mark S. Papazian,
Petitioner-Appellee,
v.

Melissa Goldberg Ryburn,
Respondent-Appellant, and

Susan V. Lucken and Nancy Varbedian,
Respondents-Appellants,
and

Edward Mardigian, Grant Mardigian
and Matthew Mardigian,
Respondents-Appellants.

Charlevoix County Probate Court
Case No. 12-011738-DE
Case No. 12-011765-TV
Hon. Frederick R. Mulhauser
(P28895)

_____/

Clifford W. Taylor (P21293)
Gerald J. Gleeson, II (P53568)
Paul D. Hudson (P69844)
Dawn M. Schluter (P43082)
Miller, Canfield, Paddock and Stone, PLC
840 West Long Lake Road, Suite 150
Troy, MI 48098
(248) 879-2000
Attorneys for Appellants Edward Mardigian, Grant Mardigian, and Matthew Mardigian

Joseph A. Ahern (P38710)
Ahern & Kill, P.C.
Attorneys for Appellant Goldberg

Marc E. Thomas (P25628)
Bendure & Thomas
Attorneys for Appellants Lucken and Varbedian

Kimberly J. Ruppel (P55138)
Attorney for J.P. Morgan Chase Bank

Rodger D. Young (P22652)
J. David Garcia (P60194)
Attorneys for Petitioner-Appellee

_____/

RESPONDENTS' APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

JUDGMENT APPEALED FROM

Respondents-Appellants Edward Mardigian, Grant Mardigian, Matthew Mardigian, Melissa Goldberg Ryburn, Susan V. Lucken, and Nancy Varbedian seek leave to appeal the Court of Appeals' October 8, 2015 decision reversing the Charlevoix County Probate Court's November 6, 2013 grant of summary disposition to Appellants.

QUESTIONS PRESENTED FOR REVIEW

1. Appellee, a Michigan lawyer, violated Michigan Rule of Professional Conduct 1.8(c) by preparing a will and trust for an unrelated client under which Appellee and his children were to receive over $16 million. Are the offending gifts void as a matter of law as against public policy?

   The probate court answered yes.
   Appellants answer yes.
   The Court of Appeals answered no.
   Appellee answers no.

2. The Court of Appeals held that the offending gifts were not void because it was bound to follow this Court's pre-MRPC decision in *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965). To the extent MRPC 1.8(c) does not already render *Powers* dead letter, should this Court expressly overrule it?

   Appellants answer yes.
   Appellee presumably answers no.
   The probate court held that MRPC 1.8(c) trumps *Powers*.
   The Court of Appeals stated it "lack[ed] the authority to overrule *Powers*."

3. The Court of Appeals' holding that *Powers* trumps Rule 1.8(c) misconstrues this Court's constitutional rulemaking authority and would handcuff the Court's ability to pass rules of practice and procedure. Should the Court grant leave to clarify this significant jurisprudential issue?

   Appellants answer yes.
   Appellee presumably answers no.
   The probate court and the Court of Appeals did not reach this issue.

INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

The issue in this case is whether a Michigan lawyer may profit $16 million dollars from his violation of the Rules of Professional Conduct. Appellee Mark Papazian, a Michigan lawyer, prepared a will and trust under which he and his children were to receive $16 million in assets from an unrelated client. This flatly violated Michigan Rule of Professional Conduct 1.8(c), which expressly provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." MRPC 1.8(c).

The probate court held that because Mr. Papazian violated MRPC 1.8(c), the offending provisions of the will and trust were void as a matter of law as against public policy. The Court of Appeals, however, held in a 2-1 published opinion that the offending gifts were not necessarily void. The panel majority held that Mr. Papazian was permitted to proceed to a jury trial to attempt to convince a jury that, despite his ethical breach, he did not "unduly influence" the decedent to leave him the money. The panel majority stated that it was bound to follow this Court's pre-MRPC decision in *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965), which suggested that a lawyers' drafting such a will was "irrelevant" and creates only a "presumption" of undue influence, and one the lawyer can rebut at trial.

This Court should grant leave to appeal. A Michigan lawyer should not be permitted to profit from his or her violation of the Rules of Professional Conduct,

and Michigan courts should not be in the business of condoning such behavior. As this Court has instructed, the MRPC are "definitive indicators of public policy," and a Michigan court simply cannot and will not enforce a legal instrument that violates public policy. *See Terrien v Zwit*, 467 Mich 56, 67 n.11; 648 NW2d 602, 608 (2002). The offending provisions are void as a matter of law. And since there is then no legally enforceable expression of the testator's intent with respect to the offending provisions, the lawyer is not permitted to plead his case to a jury on the factual issue of whether he exerted "undue influence" over the decedent. As the Court of Appeals dissent recognized, "once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent." (Dissent at 3.)

This case presents issues of tremendous importance to Michigan jurisprudence. It strikes at the very core of the judicial function: When a lawyer violates the ethics rules in preparing a legal instrument and then asks a Michigan court to enforce it, what must the court do? Is the court's role, as Mr. Papazian argues, simply to pass the ethics issue to the Attorney Grievance Commission while enforcing the offending instrument? Or does a Michigan court have an affirmative obligation to refuse to enforce a legal instrument that violates the ethics rules and thereby violates public policy? Appellants believe it must be the latter—otherwise Michigan courts would be forced to quite literally sign off on an ethics violation by declaring to the public that a will is valid even though it was prepared by an

unethical lawyer in violation of the ethics rules. Appellants respectfully request that the Court grant leave to so clarify. And to the extent the Court's pre-MRPC decision in *Powers* is not already dead letter by virtue of MRPC 1.8(c), this Court should grant leave to expressly overrule it.

Moreover, this case raises significant issues regarding this Court's constitutional authority to enact rules of practice and procedure. This Court adopted the Michigan Rules of Professional Conduct in 1988 pursuant to Constitutional and legislative grants of authority to establish rules of practice and procedure governing the conduct of members of the Bar. Const. 1963, art. 6 § 5; MCL 600.904. The MRPC, in short, have the full force of law, equivalent to a statute on this issue (in fact superior to a statute, given the Court's constitutional supremacy in this realm). And in MRPC 1.8(c), the Court unequivocally and absolutely barred the precise conduct here: a lawyer "shall not" do it. The Court of Appeals' holding that *Powers* somehow trumps the MRPC's express prohibition—in effect, drafting an "undue influence" exception into Rule—misconstrues and would significantly handcuff this Court's rulemaking power. The Court should grant leave to clarify the supremacy of its rulemaking power in this area.

In short, the Court should grant leave to appeal to confirm that it meant what it said when it passed MRPC 1.8(c). The Court said a lawyer "shall not" do what Mr. Papazian did; no exceptions. And the Court should confirm that the consequence of a violation of MRPC 1.8(c) is not a cynical trade of a Bar card for an

ill-begotten fortune. The consequence instead is the unethical provisions are void as a matter of law, each time, every time; no exceptions.

This case presents legal principles of major significance to this Court's jurisprudence, and the Court of Appeals' decision conflicts with decisions of this Court, is clearly erroneous, and will cause material injustice. Appellants therefore seek leave to appeal under MCR 7.305(B)(3), and (5), and respectfully request that the Court reverse the Court of Appeals' decision and reinstate the probate court's grant of summary disposition to Appellants. In the alternative, Appellants respectfully request that the Court peremptorily reverse for the reasons stated in the Court of Appeals' dissent.

STATEMENT OF THE MATERIAL PROCEEDINGS AND FACTS

I. Mr. Papazian Prepared a Will and Trust for an Unrelated Client Under Which He and His Children Were to Receive Substantial Gifts

The dispositive fact in this case is not in dispute. Mark Papazian, a Michigan lawyer subject to the Michigan Rules of Professional Conduct, prepared a will and trust for decedent Robert Mardigian under which Mr. Papazian and his two children were to receive approximately $16 million in assets. (*See* Ex. A, Last Will and Testament of Robert Mardigian dated June 8, 2011; Ex. B, Amendment and Restatement of the Robert Douglas Mardigian Revocable Trust dated August 13, 2010.) The will Mr. Papazian prepared contained bequests of personal property to Papazian—including a jet ski and a pontoon boat—and provided that the bulk of the remaining estate poured over to a revocable trust. (Ex. A.) The revocable trust, which Mr. Papazian also prepared, then provided that Mr. Papazian and his

children would receive the bulk of Mr. Mardigian's multi-million-dollar estate. (Ex. B.) Mr. Papazian prepared both instruments, and both contained substantial gifts to Papazian and his children.

Mr. Papazian ducked and weaved for months in the probate court trying to escape this inescapable fact. He first asserted that one of his law partners was the one who made the changes to the decedent's trust documents. (Papazian's Motion for Partial Summary Disposition dated May 16, 2012 at 3-4.) After his partner adamantly denied it, Mr. Papazian backed away from that theory. Then he argued for a while that his *secretary* was the one who actually typed the documents, attempting to suggest, perhaps, that this meant he did not "prepare" the will or trust in violation of MRPC 1.8(c). Mr. Papazian also suggested at various points that other law firms and professionals played roles in preparing or reviewing the various estate-planning documents, attempting to suggest, perhaps, that this involvement somehow scrubbed the stain of his violation of MRPC 1.8(c).

It is no longer genuinely disputed, however, that Mr. Papazian did indeed prepare the relevant will and trust documents for Mr. Mardigian. Mr. Papazian admitted he did so in his deposition. (*See* Ex. C; Papazian dep. at 368. "Q: [Y]ou admit drafting . . . the Last Will? A: Yes, I do admit that.") And his counsel admitted in open court that "there is no factual dispute" that Mr. Papazian prepared the operative will and trust documents. (Ex. D, Tr. Nov. 6, 2013 at 42.)

There is therefore no genuine issue of material fact that Mr. Papazian prepared the will and trust under which he and his children were to receive $16 million.

II. Mr. Papazian Sought an Order from the Probate Court Declaring that the Will He Prepared in Violation of MRPC 1.8(c) was Nonetheless "Valid." The Probate Court Held that Because Mr. Papazian Violated MRPC 1.8(c), the Offending Provisions of the Will and Trust Were Void as a Matter of Law.

Mr. Papazian initiated this action in the Charlevoix County Probate Court in February 2012. He affirmatively asked the court to declare that the will and trust he prepared in violation of MRPC 1.8(c) was valid and enforceable. Specifically, in his February 17, 2012 Petition for Admission for Probate, he asked the court to enter "An order determining that [the will] is valid and admitted to probate."

Appellants are family members and friends of the decedent who will inherit Mr. Mardigian's estate if the gifts to Mr. Papazian and his children are disallowed. This is because the will and trust contained contingency clauses that if any provision failed, the assets would resort to Mr. Mardigian's family members and friends. (*See* Ex. A, § III, Ex. B, § 4.)[1]

Appellants moved for summary disposition under MCR 2.116(C)(10) on the grounds that (1) there was no genuine issue of material fact that Mr. Papazian prepared the will and trust under which he and his children were to receive $16 million in assets; (2) Mr. Papazian violated MRPC 1.8(c) in so doing; and therefore

[1] Appellants have entered into a contingent settlement agreement pending the outcome of this appeal.

(3) the gifts to Mr. Papazian and his children are void as against public policy as a matter of law. Mr. Papazian countered that there supposedly is not a "per se" bar to such gifts under Michigan law, and that he was entitled to proceed to a jury trial to attempt to prove that he did not exert "undue influence" over the decedent.

On November 6, 2013, the Charlevoix County Probate Court granted summary disposition to Appellants. The court held that because Mr. Papazian violated Rule 1.8(c) when he drafted the will and trust, the offending gifts were void as against public policy. The court reasoned:

> Well, the Court is prepared to find that, based on there being no factual dispute about [Papazian preparing the estate documents], that the Court would not accept the Will and Trust prepared by the attorney that benefits himself and his family for the purposes of probate and eventual enforcement . . . . The court . . . makes that decision based on that being not permitted under the Rules of Professional Responsibility. And the Court would be disinclined to enforce such a document in the court of this state.

(Tr Nov 6, 2013 at p. 43.)

III. The Court of Appeals Reversed in a 2-1 Published Decision

The Court of Appeals reversed. The panel majority acknowledged that "appellees rightly recognize that MRPC 1.8(c) expressly prohibits the conduct at issue here." (Slip Op. at 4.) The majority held, however, that it was bound to follow this Court's decision in *In re Powers Estate*, 375 Mich 150; 134 NW2d 148 (1965), a pre-Michigan Rules of Professional Conduct decision in which the Court stated it was "irrelevant" that an attorney had drafted a will under which he was set to inherit. The *Powers* Court held that the lawyer could proceed to a jury trial to attempt to convince the jury that he did not "unduly influence" the testator. *Id.* at 176.

The panel majority held that *Powers* continued to control despite this Court's subsequent enactment of Rule 1.8(c) in 1988 because although Mr. Papazian's "violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy." (Slip Op. at 5; emphasis in original.) Hence, held the panel, "[u]nder *Powers,* we are required to remand for further proceedings, where appellant could be required to overcome the presumption of undue influence arising from the attorney-client relationship in order to receive the devises left to him and his family." (*Id.* at 4.) The panel majority held that this was so even if other cases "may have correctly foretold the outcome to be reached by our Supreme Court should it decide to consider a case with such facts as are presented here," because "we lack the authority to overrule *Powers*[.]" (*Id.*)

The Court of Appeals dissent noted that "*Powers* was decided long before the 1988 enactment of the MRPC," and "MRPC 1.8(c) now specifically prohibits this conduct." (Dissent at 1.) And "[b]ecause 'the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904 . . . conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy.'" (*Id.* at 2; quoting *Speicher v. Columbia Tp Bd of Election Com'rs*, 299 Mich App 86, 91; 832 NW2d 392 (2012).) "Thus, once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent." (Dissent at 3.) The

dissent would have affirmed the probate court's grant of summary disposition to Appellants. (*Id.*)

ARGUMENT

I. THE COURT SHOULD GRANT LEAVE TO APPEAL TO RESOLVE THE SIGNIFICANT LEGAL QUESTION OF WHETHER A MICHIGAN LAWYER MAY INHERIT UNDER A WILL HE PREPARED IN VIOLATION OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

Under the Court of Appeals' decision, a Michigan lawyer may violate the Rules of Professional Conduct in preparing estate documents for an unrelated client and still inherit under the unethical documents. This is contrary to law and sensible judicial functioning, and this Court should grant leave to resolve this issue.

A. MRPC 1.8(c) Provides that a Lawyer "Shall Not" Prepare Estate Documents for an Unrelated Client that Leave the Lawyer a Significant Gift.

For over a century, Michigan courts have "bluntly warned" lawyers not to draft wills for unrelated clients that contain substantial testamentary gifts to the lawyer. *See Abrey v Duffield*, 149 Mich 248, 259; 112 NW 936 (1907); *In re Powers Estate*, 375 Mich 150, 181; 134 NW2d 148, 164 (1965). Courts have repeated the warning over the years, and have held that it is "generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor." *Estate of Karabatian v Hnot*, 17 Mich App 541; 170 NW2d 166 (1969).

In 1988, this Court turned the repeated warnings into an absolute prohibition. This Court enacted the Michigan Rules of Professional Conduct in 1988 pursuant to a Constitutional grant of authority to establish rules of practice and

procedure, Const. 1963, art. 6, § 5, and a Legislative grant of authority to "adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members," MCL 600.904. As this Court has noted, "Const. 1963, art. 6, § 58 and MCL 600.904 give this Court the duty and responsibility to regulate and discipline the members of the bar of this state." *Grievance Adm'r v Fieger*, 476 Mich 231, 240; 719 NW2d 123, 131 (2006); *see also People v LaLone*, 432 Mich 103, 134-35; 437 NW2d 611, 624 (1989) ("Article 6, § 5 of the Michigan Constitution of 1963 grants this Court the power to establish and amend rules of procedure. This constitutional provision enables this Court to stand as the *final arbiter of the rules of practice and procedure*.") (Archer, J., concurring; emphasis added).

Among the rules the Court enacted were MRPC 1.7 and 1.8, which address conflicts of interest. MRPC 1.7 is titled, "Conflict of Interest: General Rule," and, naturally, sets forth the general rules governing attorney conflicts. MRPC 1.8 is titled, "Conflict of Interest: Prohibited Transactions," and contains a list of specific forbidden conflict situations. These include entering into business transactions with a client except under certain conditions (1.8(a)), using information relating to a representation to the disadvantage of a client (1.8(b)), accepting compensation for representing a client from one other than the client except under certain conditions (1.8(f)), and others.

MRPC 1.8(c) is among these prohibitions, and flatly prohibits lawyers from receiving substantial testamentary gifts in wills they prepare for unrelated clients. The rule provides in full:

> A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

The rule is absolute—a lawyer "shall not" do this, no exceptions. Some conflicts under MRPC 1.7 and 1.8 are waivable. MRCP 1.7(a), for example, provides that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . each client consents after consultation." MRPC 1.8(a), for example, provides that a lawyer "shall not enter into business transaction with a client . . . unless . . . the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and . . . the client consents in writing." *See also, e.g.*, MRPC 1.7(b), 1.8(f).

MRPC 1.8(c), on the other hand, is *not* waivable. *See* MRPC 1.8(c). So even if a client purported to execute a waiver stating that he or she was aware that a substantial gift to the lawyer drafting the will violated the ethics rules and the client nonetheless waived any conflict, the waiver would not be enforceable. Rule 1.8(c) is a bright-line rule: a lawyer "shall not" do this, under any circumstances.

For over 25 years, therefore, the MRPC have flatly barred attorneys from preparing estate-planning documents for unrelated clients under which the attorney receives a substantial testamentary gift. No exceptions. It does not matter if the attorney is good friends with the client. It does not matter if the attorney does not exert "undue influence" on the client. Lawyers simply "shall not" do it.

For over 25 years, in other words, Rule 1.8(c) has flatly prohibited the exact thing Mr. Papazian did here: He prepared a will and trust for an unrelated client giving him and his children substantial testamentary gifts.

B. When an Attorney Violates the MRPC in Preparing a Legal Instrument, the Offending Provisions are Void and Unenforceable as Against Public Policy.

The premise of Mr. Papazian's appeal is that the *consequence* of his violation of MRPC 1.8(c) remains an open question—that it remains an open question whether a court may enforce a legal instrument prepared in violation of the Michigan Rules of Professional Conduct. The Court of Appeals agreed with this premise, holding that the will and trust were not necessarily void as a matter of law as against public policy even though Mr. Papazian had violated MRPC 1.8(c). The panel majority stated that "while the violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy." (Slip Op. at 5.)

Respectfully, the Court of Appeals was wrong. Under controlling law from this Court, (1) the Michigan Rules of Professional Conduct are "definitive indicators" of Michigan public policy; (2) an attorney who violates the Michigan Rules of Professional Conduct therefore violates Michigan public policy; and (3) Michigan courts simply may not and will not enforce provisions of a legal instrument that violate public policy. Michigan law does not permit Mr. Papazian to attempt to argue to a jury that, despite his violation of the ethics rules and Michigan public policy, the $16 million gifts might somehow still be enforceable. The gifts are *void* as a matter of law because they violate public policy.

Specifically, in *Terrien v Zwit*, 467 Mich 56, 67 n.11; 648 NW2d 602, 608 (2002), this Court stated that "public rules of professional conduct may [] constitute *definitive indicators* of public policy." (Emphasis added.) Likewise, in *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997), the Court "agree[d]" with the dissent from the Court of Appeals stating that "conduct that violates attorney discipline rules offends Michigan public policy." Following these decisions, the Court of Appeals has in turn made clear that "the Legislature delegated the determination of public policy regarding the activities of the State Bar of Michigan to the judiciary pursuant to MCL 600.904; thus, *conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy*." *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 92; 832 NW2d 392, 395 (2012) (emphasis added).

In short, it is settled law that when a lawyer violates the MRPC in preparing a legal instrument, the lawyer thereby violates Michigan public policy. Thus, when Mr. Papazian violated MRPC 1.8(c) in preparing the will and trust, he thereby violated Michigan public policy.

Equally well-established is the principle that when a bequest in a testamentary instrument violates public policy, it is *void* as a matter of law. Indeed, two provisions of the Estates and Protected Individuals Code (EPIC) expressly bar the creation of will and trust instruments that are "contrary to public policy." *See* MCL 700.7404 ("A trust may be created only to the extent its purposes are lawful, *not contrary to public policy*, and possible to achieve") (emphasis added);

MCL 700.2705 ("The meaning and legal effect of a governing instrument other than a trust are determined by the local law of the state selected in the governing instrument, unless the application of that law is *contrary to . . . another public policy of this state* otherwise applicable to the disposition") (emphasis added).

And this Court has said so repeatedly, for decades. In *La Fond v City of Detroit*, 357 Mich 362, 363; 98 NW2d 530 (1959), this Court held that a bequest of a residuary estate to the City of Detroit for a "playfield for white children" was void as against public policy. In *Billings v Marshall Furnace Co*, 210 Mich 1, 5; 177 NW 222, 223 (1920), the Court held that a paragraph in a will in which the testator attempted to "perpetuate certain persons in office and control of the company without regard to the rights of minority stockholders" was "contrary to public policy and void." And in *Farr v Whitefield*, 322 Mich 275, 281; 33 NW2d 791, 794 (1948), the Court held that a provision in a will that provided that if the testator's minor children contested the will, the gifts to them were forfeited, was "contrary to public policy and void." The Court stated that "Any provision in a will which, in its application, comes in conflict with the organic or statutory law of the state . . . must be deemed to be illegal and void, as being against public policy." *Id.*[2]

[2] These decisions also provide authority for the proposition that it is only the specific provisions that violate public policy that are void, not the entire instrument. In *LaFond*, for example, the Court voided only the offending residuary clause of the will; in *Billings* the Court voided only the specific paragraph of the will that violated public policy. So here, only the offending bequests to Mr. Papazian and his children are void, and the remainder of the will and trust are enforceable in accordance with Mr. Mardigian's testamentary intent.

In short, Michigan courts simply will not enforce a testamentary provision that is against public policy. This is because "[t]he primary goal of the Court in construing a will is to effectuate, *to the extent consistent with the law*, the intent of the testator." *In re Raymond's Estate*, 483 Mich 48, 52, 764 NW2d 1 (2009) (emphasis added). And it is a bright-line rule that when a provision in a will violates Michigan public policy it is *inconsistent* with the law and "*must* be deemed to be illegal and void." *Farr*, 322 Mich at 281 (emphasis added).

Several Court of Appeals decisions confirm that bright-line rule. In three published decisions, the Court of Appeals has held that when an attorney violates the MRPC in creating an instrument, the offending provisions of the instrument are void as against public policy. In *Evans v Luptak*, 251 Mich App 187; 650 NW2d 364 (2002), the Court of Appeals refused to enforce an unethical referral-fee contract. The court reasoned that "Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers," and "our courts have taken affirmative action to enforce our ethical standards and rules regarding counsel." *Id.* at 194. Following this Court's decision in *Abrams*, which "agree[d]" with and adopted the dissent from the Court of Appeals in the case, the Court of Appeals stated that it "should refuse to aid either party to an unjust contract where, as here, enforcing the agreement would further a purpose that violates public policy." *Id.* at 196. "It would be *absurd* if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement." *Id.* (emphasis added). The Court of Appeals held

that based on "binding precedent" from this Court, "it is clear the Supreme Court agreed with the fundamental principle that contracts that violate our ethical rules violate our public policy and therefore are unenforceable." *Id.* at 196.

Similarly, in *Morris & Doherty, PC v Lockwood*, 259 Mich App 38; 672 NW2d 884 (2003), the Court refused to enforce a referral-fee agreement between a lawyer and an "inactive" member of the Bar. The Court held that "a referral fee agreement between an attorney and an inactive attorney is not enforceable" because MRPC 5.4(a) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer." 259 Mich App at 45. The Court reasoned that "[a]lthough, as a general rule, courts must provide competent parties the utmost liberty to engage in contractual relations, a contract is valid only if it involves a proper subject matter." *Id.* at 54 (internal citation and quotation marks omitted). And "[a] proposed contract is concerned with a proper subject matter only if the contract performance requirements are not *contrary to public policy*." *Id.* (emphasis in original). The Court stated that Michigan's public policy is stated, among other places, in its "public rules of professional conduct." *Id.* The Court concluded that the agreement violated several provisions of the MRPC, and "[t]hus, as a matter of public policy, the contract is void ab initio." *Id.* at 60. "[T]he contract does not contain a proper subject matter, and is not enforceable because it violates Michigan's public policy." *Id.* at 61.

Likewise, in *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 92; 832 NW2d 392, 395 (2012), the Court of Appeals, following both *Evans &*

Luptak and *Morris & Doherty*, rejected an attorney's post-judgment request to recover attorney fees, because the requested fees violated MRPC 1.5(a). The court held that MRPC 1.5(a) "reflects this state's policy concerning fee agreements" and "is a public policy restraint on illegal or clearly excessive fees." *Id.* at 93. The Court reasoned, as quoted above, that "conduct that violates attorney discipline rules set forth in the rules of professional conduct violates public policy." *Id.* at 92.[3]

Finally, in *Estate of Karabatian v Hnot*, 17 Mich App 541; 170 NW2d 166 (1969), the Court of Appeals expressly held that when a lawyer who is unrelated to the decedent drafts a will that contains a bequest to the lawyer, the bequest is against public policy and therefore void as a matter of law. The lawyer in *Karabatian* drafted a will "in which the attorney was to receive a bequest for $10,000." 17 Mich App at 542. "Using a different scrivener, Karabatian subsequently made another will in which he left the attorney nothing." *Id.* The attorney contested admission of the later will to probate, claiming that Karabatian was a victim of an "insane delusion," and argued that he should recover under the earlier will. *Id.* The probate court granted a directed verdict against the attorney,

[3] The panel majority in this case attempted to distinguish these cases on the ground that these cases involved contracts and "[a] will is generally *not* a contract." (Slip Op. at 5.) Respectfully, this misses the point. The point of these cases is that a court has an *affirmative obligation* to enforce the ethics rules, thus when a lawyer comes before the court asking the court to enforce a legal instrument he prepared in violation of the ethics rules, the court simply cannot and will not enforce it. The offending unethical provisions are void as a matter of law. And since there is then no legally enforceable instrument to interpret, factual questions such as the intent of the contracting parties or the intent of the testator are simply not before the court. A court cannot interpret or enforce a void legal document—it is void.

and the Court of Appeals affirmed. *Id.* The Court noted that "Long ago in *Abrey v Duffield* (1907), 149 Mich 248, 259; 112 NW 936, 940, our Supreme Court condemned the practice followed by [the attorney]: . . . Although there is no statute to invalidate a bequest to a scrivener, the reasons are, at least, as strong for such a statute as in the case of the subscribing witness. I believe it to be *generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor*, and this court has held that such dispositions are properly looked upon with suspicion." 17 Mich App at 546 (emphasis added). The court cited *Powers*, 375 Mich at 181, where this Court noted that it "almost 60 years ago bluntly warned the profession against such conduct." 17 Mich App at 546. The court stated: "Apparently warnings do not suffice. If an attorney's conduct so violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state." *Id.* at 546-47. The Court held that "[t]he bequest to [the attorney] being void, he has no standing to contest the later will." *Id.* at 547.

The rule from all of these cases is clear: When an attorney violates the ethics rules, he or she violates Michigan public policy, and courts simply will not enforce the resulting provisions that violate public policy. The provisions are void ab initio as a matter of law.

C. This Court Should Grant Leave to Appeal to Make Clear that Michigan Courts Have the Authority and Obligation to Enforce the MRPC By Refusing to Sanction Instruments Drawn in Violation of the Ethics Rules; Courts Do Not Simply Leave the Matter to the Attorney Grievance Commission.

Mr. Papazian argued below that courts must take a blind eye to his blatant ethical violation because "MRPC Rule 1.0(b) expressly states that the Rules of Professional Conduct do not give rise to a cause of action for enforcement of a rule or for failure to comply with a prohibition imposed by the rule." (Papazian's Br. at 18; emphasis is Papazian's.) Mr. Papazian argued that "[t]o the extent that one believes that a testamentary gift may violate Rule 1.8(c), that allegation should be lodged with, and resolved by, the attorney grievance committee, not the Probate Court." (*Id.*)

Courts have repeatedly rejected that argument, and for good reason. In *Evans & Luptak*, for example, the plaintiff made a nearly identical argument: "plaintiff argues that the MRPC may not be used as a defense to plaintiff's breach of contract action because the rules expressly provide that they do not give rise to a cause of action for enforcement of a rule or for damages caused by a failure to comply with an ethical obligation." 251 Mich App at 192. The plaintiff further argued, as Mr. Papazian does here, that "the Michigan Rules of Professional Conduct are not rules of substantive law and therefore are inapplicable in court proceedings." *Id.* at 194.

The court rejected those arguments out of hand. The court noted that "Plaintiff's argument appears to be that judges have no ethical oversight regarding their court officers and that the Attorney Grievance Commission is the exclusive

authority regulating the ethical obligations of attorneys." *Id.* "In this regard, plaintiff fails to understand the proper role of the court regarding the ethical conduct of its officers." *Id.* The court noted that "Michigan has a long tradition of judicial oversight of the ethical conduct of its court officers," and the courts have long "taken affirmative action to enforce our ethical standards and rules regarding counsel." *Id.* As the court put it in *Speicher*, "courts have the authority and *obligation* to take affirmative action to enforce the ethical standards set forth by the Michigan Rules of Professional Conduct." 299 Mich App at 91 (emphasis added). Simply put, "[t]he question of civil liability for an ethics violation is distinguishable from the present issue whether the courts of this state should enforce, and thereby sanction unethical contracts." *Evans & Luptak*, 251 Mich App at 195-96 (quoting *Abrams* lower court dissent followed by this Court).

The same is true here. This is not a cause of action against Mark Papazian for his violation of MRPC 1.8(c), and the issue here is not whether someone can recover damages from him for his unethical conduct. The issue is whether the court "should enforce, and thereby sanction," the unethical bequests in the estate documents that he prepared, which are contrary to MRPC 1.8(c) and the public policy of this state. Courts have answered that question: "It would be *absurd* if an attorney were allowed to enforce an unethical [instrument] through court action, even though the attorney potentially is subject to professional discipline" for preparing it. *Evans & Luptak*, 251 Mich App at 196 (quoting *Abrams* dissent).

Mr. Papazian was therefore wrong when he argued below that courts might in some circumstances have to look the other way following an ethical breach and nonetheless enforce the offending instrument. Mr. Papazian was wrong that "[t]he Probate Court cannot rest its ruling on the Rules of Professional Conduct" (Papazian's Court of Appeals Br. at 29); Mr. Papazian was wrong that "such violations [of the MRPC] are irrelevant to the validity of the documents themselves" (*id.* at 30); and Mr. Papazian was wrong that there is "no per se 'bar' to an attorney-scrivener taking under estate planning documents that the attorney drafted" (*id.* at 26). The probate court was *required* under controlling precedent from this Court and the Court of Appeals to refuse to enforce a bequest drawn in violation of the Rules of Professional Conduct. Under well-established Michigan law, there is a bright-line, per se bar to an attorney taking under estate planning documents that the attorney prepared for an unrelated client.

This Court should grant leave to appeal to confirm this significant jurisprudential issue.

II. TO THE EXTENT *IN RE ESTATE OF POWERS* IS NOT ALREADY DEAD LETTER, THE COURT SHOULD EXPRESSLY OVERRULE IT

The Court of Appeals held that it was bound to follow this Court's decision in *Powers* because "*Powers* is directly on point to the facts presented in the instant case, and as such is binding on this Court." (Slip Op. at 4.) And "[u]nder *Powers*," held the panel majority, "we are required to remand for further proceedings, where appellant would be required to overcome the presumption of undue influence

arising from the attorney-client relationship in order to receive the devises left to him and his family." (*Id.*)

The majority stated that, "[i]f appellees were correct that MCL 700.7410(1) and MCL 700.2705, together with MRPC 1.8(c) make it clear that the public policy of this state prohibits an attorney or specified relative from receiving a devise from an instrument prepared by the attorney for a client, this case might be distinguishable from *Powers*." (*Id.* at 5.) But, held the majority, "while the violation of MRPC 1.8(c) is clearly unethical conduct, it is not *clearly* conduct against public policy." (*Id.*) The majority held that *Powers* thus controlled, even if other cases "may have correctly foretold the outcome to be reached by our Supreme Court should it decide to consider a case with such facts as are presented here," because "we lack the authority to overrule *Powers*." (*Id.* at 4.)

The Court of Appeals' analysis was incorrect—*Powers* is no longer controlling law. First, the case has been superseded by this Court's adoption of the Michigan Rules of Professional Conduct. When *Powers* was decided in 1965, there was no rule of professional conduct that expressly barred attorney-scrivener bequests. As the Court of Appeals dissent noted, "*Powers* was decided long before the 1988 enactment of the MRPC, or even its predecessor, the Code of Professional Conduct, which was adopted in 1971," and "MRPC 1.8(c) now specifically prohibits this conduct." (Dissent at 1.) Attorney-scrivener bequests now plainly violate MRPC 1.8(c), and, as shown above, under controlling caselaw are therefore void as a matter of law because they violate public policy. *See Terrien*, 467 Mich at 67 n.11;

LaFond, 357 Mich at 363; *In re Raymond's Estate*, 483 Mich at 52; *Farr*, 322 Mich at 281.

Second, *In re Powers* has been superseded by statute. As shown above, MCL 700.7404 and 700.7410(1) expressly bar the creation of will and trust instruments that are "contrary to public policy." Under current law (and under the law in effect when Mr. Mardigian signed the amendments to his revocable trust on August 13, 2010), provisions of a will and trust drawn in violation of MRPC 1.8(c) are therefore void as against public policy.

To the extent these statutory provisions and MRPC 1.8(c) do not already render *Powers* dead letter, this Court should grant leave to appeal to overrule *Powers* expressly. *Powers* is simply not an accurate statement of current Michigan law. *Powers* stated, for example, that the fact that a lawyer drafted the will was "*irrelevant*," and that the lawyer's "status as a member of the bar of Michigan adds not one centimeter, nor subtracts one from his position as a party litigant, and this question should take no time in trial." 375 Mich at 176 (emphasis added). *Nobody* could argue that this is an accurate statement of current Michigan law. Under no view of current Michigan law could it be said it is "irrelevant" that an attorney prepared a will for an unrelated testator under which the attorney was to receive a substantial bequest. Instead, current Michigan law instructs that the *dispositive* issue is whether the attorney prepared the will: If the attorney drafts the will, he or she violates MRPC 1.8(c), and the bequest is void as a matter of law. The Court

should grant leave to overrule *Powers* and confirm this significant jurisprudential issue.

III. THE COURT SHOULD GRANT LEAVE TO RESOLVE SIGNIFICANT LEGAL ISSUES REGARDING ITS POWER TO ENACT RULES OF PRACTICE AND PROCEDURE THAT ARE INCONSISTENT WITH ITS PRIOR DECISIONS

Finally, this Court should also grant leave to appeal because the Court of Appeals' decision threatens this Court's rulemaking powers. Under the Court of Appeals' analysis, this Court could *never* pass a rule that was inconsistent with one of its earlier decisions. Even where, as here, the Court wished to pass a clear and absolute rule prohibiting certain attorney conduct (here, MRPC 1.8(c)), under the Court of Appeals' analysis this Court's hands would be tied (here, by *Powers*).

This fundamentally misconstrues this Court's rulemaking power. As detailed above, this Court adopted the MRPC pursuant to a Constitutional grant of authority to establish rules of practice and procedure, Const. 1963, art. 6, § 5, and a Legislative grant of authority to "adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members," MCL 600.904. As this Court has noted, "Const. 1963, art. 6, § 58 and MCL 600.904 give this Court the *duty and responsibility* to regulate and discipline the members of the bar of this state," and this Court thereby stands as the "final arbiter" of the rules of practice and procedure. *Fieger*, 476 Mich at 240 (emphasis added); *LaLone*, 432 Mich at 134-35 (Archer, J., concurring).

When the Court enacts a Rule of Professional Conduct, therefore, the Rule sweeps the field before it. The Rule has the force of a statute—since the Legislature

delegated legislative authority in this area—and an inconsistent earlier Court decision bows to the controlling effect of the Rule. Indeed, the Rule would have *super*-statutory force, since the Court has supremacy in this realm. This means that even if the Legislature passed a statute purporting to regulate in this area—for example, if the Legislature passed a statute purporting to add an "undue influence" exception to Rule 1.8(c)—the Rule of Professional Conduct would control. And this means that a Rule of Professional Conduct—as a supreme expression of the Court's rulemaking power—likewise trumps an earlier court decision, just as a statute would.

Here, therefore, MRPC 1.8(c)'s absolute prohibition controls. When the Court stated clearly and unequivocally in 1988 that a lawyer "shall not" prepare a will for an unrelated client leaving him- or herself a substantial testamentary gift, this meant exactly what it said. The Court did not include in the rule an exception providing that a lawyer shall not do it *unless* the lawyer can prove he did not exert "undue influence" over the client. A lawyer shall not do it; no exceptions.

This issue has implications far beyond this case. Under the Court of Appeals' treatment, anytime the Court wished to pass a rule stating "X," but a prior Court decision said "Y," the Court's hands would be tied. The Court could not, for example, pass a rule expressly prohibiting Y and have that rule control, even if that were the Court's *express purpose* in passing the rule. The Court instead would have to wait around for a case where a party litigant *violated* the rule prohibiting Y and then expressly overrule the earlier decision permitting Y. This is not a sensible

construction of the Court's rulemaking power, and this Court should grant leave to so clarify.

IV. IN THE ALTERNATIVE, THE COURT SHOULD PEREMPTORILY REVERSE FOR THE REASONS STATED IN THE COURT OF APPEALS DISSENT

In the alternative to granting leave to appeal, this Court should peremptorily reverse under MCR 7.305(H)(1) for the reasons stated in the Court of Appeals dissent. The dissenting judge got it right: "once the trial court has found the terms of a trust or instrument of disposition to be contrary to public policy the legal effect of the instrument is a foregone conclusion and the meaning of the instrument is no longer open to interpretation or subject to dispute concerning intent." (Dissent at 3.) Mr. Papazian violated Rule 1.8(c); he thereby violated public policy; and a Michigan court cannot and will not enforce a legal provision that violates public policy. The dissent correctly applies these controlling principles, and this Court should either grant leave to appeal to confirm these principles or peremptorily reverse for the reasons stated in the Court of Appeals dissent.

CONCLUSION AND RELIEF REQUESTED

Mark Papazian violated MRPC 1.8(c) by preparing a will and trust for an unrelated client that left him and his children substantial gifts. Under controlling Michigan law, the gifts are void as a matter of law because they violate public policy. This Court should grant leave to appeal to reverse the Court of Appeals' decision and affirm the probate court's grant of summary judgment to Appellants. In the alternative, the Court should peremptorily reverse for the reasons stated in the Court of Appeals dissent.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Paul D. Hudson

Clifford W. Taylor (P21293)
Gerald J. Gleeson, II (P53568)
Paul D. Hudson (P69844)
Dawn M. Schluter (P43082)
Attorneys for Respondents-Appellants
Edward Mardigian, Grant Mardigian, and Matthew Mardigian
840 West Long Lake Road, Suite 150
Troy, MI 48098
(248) 879-2000
gleeson@millercanfield.com
hudson@millercanfield.com
schluter@millercanfield.com

Dated: November 12, 2015

/s/ Joseph A. Ahern

Joseph A. Ahern P38710
Amanda A. Kill P68988
Ahern & Kill, P.C.
430 N. Old Woodward, Second Floor
Birmingham, MI 48009
(248) 723-6101
Attorneys for Melissa Goldberg Rayburn

/s/ Marc E. Thomas

Marc E. Thomas P25628
Bendure & Thomas
33 Bloomfield Hills Pkwy, Suite 220
Bloomfield Hills, MI 48304-2909
(248) 646-5255
Attorneys for Nancy Varbedian and Susan V. Lucken

25298923.1\149299-00001